APPEAL NO. 022210
FILED OCTOBER 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on August 5, 2002. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) did not sustain a compensable repetitive trauma injury or occupational disease because she failed to prove the date of injury any more specifically than the month of _____, and because she failed to give timely notice of injury as required by Sections 409.002 and 409.001 of the 1989 Act, and that because the claimant did not sustain a compensable injury she did not have disability. Both parties have appealed. The claimant appealed, arguing that the hearing officer's determinations that she did not sustain a compensable injury and did not have disability because she did not timely report her injury to her employer and failed to prove a date of injury are against the great weight and preponderance of the evidence and are based on the wrong legal standards in determining the date of injury. In its response, the respondent/cross-appellant (carrier) maintains the challenged findings are fully supported by the evidence in the record. The carrier cross-appealed, arguing that the findings that the claimant sustained an injury as a result of work activities and that the claimant was unable to obtain or retain employment at wages equivalent to her preinjury wage from December 8, 2001, through the date of the CCH were against the great weight of the evidence. The appeal file did not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part; reversed and remanded in part.

The hearing officer found that due to the claimed injury the claimant was unable to obtain or retain employment at wages equivalent to her preinjury wage from December 8, 2001, through the date of the CCH. After reviewing the record, we find sufficient evidence to support this determination.

An occupational disease includes a repetitive trauma injury. Section 401.011(34). Section 401.011(36) defines a "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment."

Unlike the case of a specific injury, the date of injury in the 1989 Act for purposes of a repetitive trauma/occupational disease is "the date on which the employee knew or should have known that the disease may be related to the employment." Section 408.007. Clearly, this standard is not as precise as the date of a specific incident. The date of an occupational disease injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-

related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definitive diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. Also, the date of the first symptoms will not necessarily constitute the date of injury. Texas Workers' Compensation Commission Appeal No. 992486, decided December 29, 1999.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 020688, decided May 16, 2002, as authority for his finding that the claimant failed to prove a date of injury and that, therefore, she failed to prove a compensable repetitive trauma injury. In the instant case the hearing officer noted in his statement of the evidence that "[a]lthough given several opportunities to be more specific concerning when her upper extremity symptoms first appeared, [c]laimant could not do any better than the month of _____."

The claimant testified that sometime near the end of _____, she began having problems doing her job with her hands, wrists, and elbows. The claimant testified about the progression of her symptoms and several coworkers who performed the same job as the claimant testified that their hands also hurt as a result of the work performed. The claimant testified that initially her symptoms came and went but in mid-August 2001 her symptoms got progressively worse and did not get better. The 1989 Act requires the reporting of injuries (Section 401.011(26)) to the employer, not mere discomfort or pain. Texas Worker's Compensation Commission Appeal No. 021373, decided July 11, 2002. We have repeatedly cautioned that the date of injury for an occupational disease is not necessarily the date of the first symptom. Texas Workers' Compensation Commission Appeal No. 950028, decided February 16, 1995; Texas Workers' Compensation Commission Appeal No. 990089, decided March 1, 1999 (Unpublished). We have also declined to attribute medical knowledge to lay persons whose own treating physicians are in doubt about the nature of an injury or its causation. Texas Workers' Compensation Commission Appeal No. 941583, decided January 9, 1995; Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). Consequently, decisions finding a date of injury to be the same as the date of the first symptom have many times been found to be against the great weight and preponderance of the evidence, and manifestly unjust. *See*, for example, Appeal No. 990089, *supra*; Texas Workers' Compensation Commission Appeal No. 982944, decided January 21, 1999; Texas Workers' Compensation Commission Appeal No. 992486, decided December 29, 1999; and Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994. It is reasonable prudence, not extraordinary prudence, that is the standard for determining when a person who did not actually know of a diagnosis should nevertheless have understood that there may be a work-related injury.

When the date of injury is an issue, the hearing officer has wide latitude in picking a date when the claimant "knew or should have known that the disease may be work related," however, the hearing officer may not refuse to resolve the issue before

him by saying the claimant had not proven a date of injury. If the hearing officer believed the evidence before him was insufficient for him to make a determination on the date of injury, the hearing officer has a duty to fully develop the facts required for the determination to be made. Section 410.163(b). We remand the case back to the hearing officer to make specific findings on a date of injury applying the correct standard and to make a finding of a specific date the notice of injury was given to the employer. It is not necessary for the hearing officer to hold any additional proceedings, or take additional evidence, although we defer to the discretion of the hearing officer on this matter. The hearing officer found that the claimant sustained damage to the physical structure of her body occurring as a result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of her employment with her employer. We find there is sufficient evidence to support this determination. However, the hearing officer based his finding that the claimant did not sustain a compensable repetitive trauma injury on the claimant's failure to prove the date of injury any more specifically than the month of _____, and because she failed to give timely notice. The finding of a date of injury will necessitate new findings on timely notice, good cause, and compensable injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge